

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ePLUS, INC.,
Plaintiff,
v.
LAWSON SOFTWARE, INC.,
Defendant.

: Civil Action
: No. 3:09CV620
: March 14, 2013

COMPLETE TRANSCRIPT OF CONFERENCE CALL
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE

APPEARANCES: (Via telephone)

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1 (The proceedings in this matter commenced at
2 10:00 AM via conference call.)

3

4 THE COURT: Hello. This is ePlus v. Lawson,
5 civil 3:09CV620. Who is here for whom, please?

6 MR. MERRITT: Craig Merritt and Paul Jacobs
7 for ePlus.

8 MR. STRAPP: Michael Strapp for ePlus.

9 MS. ALBERT: Jennifer Albert for ePlus.

10 MR. YOUNG: And David Young for ePlus.

11 MR. CARR: Judge, this is Dabney Carr for
12 Lawson Software.

13 MR. THOMASCH: Your Honor, this is Dan
14 Thomasch for Lawson Software. And with me in the
15 conference room are Josh Krevitt, Chris Dusseault and
16 Richard Mark.

17 THE COURT: All right. I gave the order,
18 Docket No. 1019, to solicit your views. I know you
19 have a brief still coming, ePlus, but I have long
20 thought that given the nature of the modifications
21 that might be required because of the scope of Federal
22 Circuit's order, that it would likely be that it would
23 be appropriate to just reassess the injunction *de novo*
24 with a view, keeping in mind, of course, the previous
25 findings that had been made that led to the first

1 injunction and making sure that it was equitable to
2 have an injunction go forward.

3 You-all took the view in your original
4 papers, I think, that I should just modify the
5 injunction to delete certain functionalities and
6 equipment. Or modules, I guess it is. That was in
7 the statements of position that you all filed at my
8 request.

9 And then Lawson wanted to keep the whole --
10 said I didn't have jurisdiction to do anything until
11 the mandate was issued. When the mandate was issued,
12 Mr. Robertson had passed away a couple of days before
13 that, and we were, as I understood it, to keep things
14 in abeyance until you-all sorted things out.

15 And then I asked for a conference call. We
16 talked about it, but I didn't talk about that issue --
17 we talked about how to proceed on the contempt
18 citation, but we didn't talk about the injunction.

19 Also by that time Lawson had filed a motion
20 to dissolve or modify the injunction, Docket No. 1011,
21 but there had been no response to it. And I thought
22 it wise to get that whole topic on the table for
23 discussion at this stage.

24 I think I know your views, Mr. Thomasch, from
25 the papers. I read your motion or your brief in

1 support of the motion that you think this needs to be
2 decided right away.

3 Mr. Merritt, who's going to speak for ePlus?

4 MR. MERRITT: Michael Strapp is, Your Honor.

5 THE COURT: All right.

6 MR. STRAPP: Your Honor, this is Michael
7 Strapp.

8 Regarding the contempt hearing, it's our
9 position that it should move forward as scheduled and
10 that there's no need to hold things up or have some
11 preliminary hearing, especially not a preliminary
12 evidentiary hearing to resolve the Rule 60(b) motion
13 filed by Lawson.

14 We will respond to the motion with an
15 opposition paper on Monday, and we expect that the
16 positions we set forth will reiterate in some respects
17 and expand in other respects the positions we had set
18 forth in our original position statement after the
19 Federal Circuit decision was handed down to respond
20 directly to some of the new arguments that are raised
21 in Lawson's Rule 60(b) motion.

22 But if the call today is primarily to discuss
23 the order of operations, in other words, how we get
24 things done, how we resolve both the Rule 60(b) motion
25 and keep the contempt hearing on track, we think it's

1 important to point out that a possible motive -- I
2 don't want to impute motives, but a possible
3 implication of Lawson's motion is that Lawson wishes
4 to trigger a ruling on the motion so that that ruling
5 would then be appealable, and that an appeal taken by
6 Lawson could be leveraged, I don't know whether
7 successfully or not, but as a means to stay the
8 contempt hearing and to delay this matter from being
9 resolved. And that's something that we certainly do
10 not want to occur. We've obviously been waiting --

11 THE COURT: Let me deal with that. I don't
12 contemplate not having the contempt hearing. I
13 contemplate dealing with Lawson's motion and giving
14 you an opportunity, as required under the rules, to
15 deal with it, and brief it, and then to give them an
16 opportunity to respond to it. And it's obviously
17 going to take some time to think about it and sort it
18 out, but I'm planning on going on with the contempt
19 hearing. And I'm asking you whether either before
20 that or after that, but in short order, it's a good
21 idea, or you-all want any evidentiary hearing to put
22 on the reasons why you should have an injunction or
23 what shape the injunction should take.

24 MR. STRAPP: So with respect to the specific
25 question of whether or not there should be an

1 evidentiary hearing, it's our position that Lawson
2 carries a heavy burden here on this Rule 60(b) motion.
3 That's the case law as interpreted by the Fourth
4 Circuit and the Federal Circuit. Many cases talk
5 about it being an extraordinary burden to modify or
6 dissolve an injunction that's already in place, which
7 make sense from a matter of policy perspective. You
8 wouldn't want to have someone who is enjoined showing
9 up at the courtroom door every month asking for the
10 injunction to be changed. And high threshold
11 standards prevent that from happening.

12 And because Lawson bears a heavy burden here
13 to prevail on its Rule 60(b) motion, we think that
14 this can be decided on the papers.

15 We think especially in light of the Federal
16 Circuit's decision, and in particular the very last
17 two sentences of that decision, which says that the
18 Federal Circuit is remanding to the District Court to
19 consider what changes are required to the terms of the
20 injunction consistent with its opinion, and in all
21 other respects affirming the decision.

22 We think that that's a limited mandate and a
23 limited directive to Your Honor, that that directive
24 serves only to consider whether or not the injunction
25 needs to be changed consistent with the decisions that

1 were made by the Federal Circuit.

2 THE COURT: That is exactly what it says, and
3 I understand that, but my question is: Do I need an
4 evidentiary with regard to how it ought to be modified
5 consistent with the opinion? That's all. I'm not
6 proposing to start all over again in life.

7 The Federal Circuit has ruled, but that
8 ruling has to be viewed in perspective of the
9 substance that led to and the findings in the
10 injunction order and the substance of the Federal
11 Circuit's decision.

12 And then what they said is, Okay, now you've
13 got an injunction here, and you've got some things
14 that are no longer valid in the judgment and some
15 things that are. And so you have to decide how you're
16 going to -- I've forgotten the exact language, but
17 they told us what to do, and that's what needs to be
18 done.

19 Don't overreact to everything. I'm trying to
20 sort out the simple issue of whether or not (A)
21 anybody wants an evidentiary hearing, is it needed,
22 and when we can have it. And I would like to have it
23 as soon as possible if it is needed.

24 MR. STRAPP: The simple answer to that
25 question is we do not believe an evidentiary hearing

1 is necessary.

2 THE COURT: All right. And, Mr. Thomasch,
3 how about you?

4 MR. THOMASCH: Your Honor, if I could respond
5 briefly to the predicate point that Mr. Strapp made.
6 Obviously, we're not just here under the Rule 60
7 motion. We're here under the mandate from the Federal
8 Circuit as well.

9 The type of heavy burden that Mr. Strapp is
10 talking about would come into play if what we were
11 saying was that circumstances between the parties had
12 changed. For instance, if we said, ePlus now is just
13 a patent troll. They are a nonpracticing entity. And
14 for that reason, we think that the injunction should
15 be dissolved going forward. We'd have a heavy burden
16 to make that test to show those changed circumstances.

17 Here this is fundamentally different. Here
18 the Federal Circuit has already demonstrated the
19 changed circumstances because the Federal Circuit has
20 said that the system claims that so heavily
21 undergridded the finding that an injunction was
22 appropriate under the four-factor test, the Federal
23 Circuit has said those claims are invalid.

24 THE COURT: Yeah, but it didn't say what you
25 just said either. So you need to be careful what you

1 say.

2 I understand, I think, what I need to do
3 here. You may have gotten your cart before the horse
4 simply by filing a motion. But now you've filed a
5 motion, you're going to have to live with the
6 consequences of it. And I'll have to sort that out.
7 But I'm obligated to do what the Federal Circuit told
8 me to do.

9 And I guess my simple question for you is:
10 Do you think you need an evidentiary hearing? And if
11 so, when do you want to have it and what's the
12 contours? So we can make some plans and get some
13 things done on your motion or for me to satisfy what
14 the Federal Circuit asked me to do.

15 That's all I'm trying to get accomplished
16 here right now.

17 MR. THOMASCH: I understand, Your Honor. We
18 do not require an evidentiary hearing because the
19 Court has never previously been asked to consider
20 whether it would be appropriate to base an injunction
21 solely on the findings of infringement of method claim
22 26 or if there was an injunction based on that one
23 method claim, what the scope of that injunction would
24 be.

25 Since that hasn't been decided, we believe

1 that if the plaintiff wants a burden on that basis and
2 not with the benefit of the system claims that they
3 had to benefit them before, they would need to make
4 that showing at a hearing. If they don't make that
5 showing at a hearing, we don't believe an injunction
6 can lie. We believe it has to be vacated *ab initio*,
7 but in any set of circumstances, Your Honor, so we
8 don't feel there's anything for us to come forward
9 with if they're not coming forward first, and so we're
10 not requesting that hearing, Your Honor.

11 THE COURT: It's your motion. Wait a minute.
12 It's your motion. And you have a motion that you
13 filed. And I'm hearing you say you don't want a
14 hearing on the evidentiary hearing. So that's all
15 right.

16 MR. THOMASCH: Oral argument, but not an
17 evidentiary hearing.

18 THE COURT: All right. So neither one of you
19 want it.

20 And, Mr. Strapp, you are aware of his
21 argument that you haven't shown in the record any
22 basis for an injunction based on that which remains
23 after the Fourth Circuit's decision. You're aware
24 that that's his argument?

25 MR. STRAPP: We are aware of that argument,

1 and I think we'll respond in the papers that we file
2 on Monday to that argument. And the response is
3 obviously simple, that the record has been laid and
4 was laid extensively two years ago, and that that
5 record was not directed solely, as Lawson reiterates,
6 to system claims, but rather the record is replete
7 with references to the method claims, including claim
8 26.

9 THE COURT: Yes, but given what the Federal
10 Circuit did and how they've teed up the issue, you're
11 going to have to specifically address how the record
12 supports an injunction as if the only finding of
13 infringement had been that which was sustained. Do
14 you understand that? Do you understand that?

15 MR. STRAPP: That's not consistent with my
16 understanding.

17 THE COURT: Well, I'm going to tell you it's
18 consistent with mine that you're going to have to
19 address that question. You can make other arguments,
20 but that's one you need to make. Whatever you want to
21 present is your business, and I'm not trying to limit
22 you, but I am saying that that's an issue that he's
23 teed up and that I need to have your advices on.
24 That's all.

25 MR. STRAPP: Okay. We will definitely

1 respond to that issue in full in the papers that we
2 file on Monday, but if you would indulge me just to
3 make one point here.

4 THE COURT: Sure.

5 MR. STRAPP: I think that the notion that a
6 party who filed a Rule 60(b) motion can simply by its
7 say-so shift the burden to the opposing party and say
8 that that party opposing the Rule 60(b) motion somehow
9 has the burden of proof in production to come forward
10 with evidence to show that the Rule 60(b) motion
11 should be denied simply turns everything that I know
12 about civil procedure on its head.

13 THE COURT: Mr. Strapp, it surely does. And
14 Mr. Thomasch would have been really well advised to
15 have held his powder and not to have filed this
16 motion. But I think he thought that I was asleep and
17 wasn't paying any attention to the case simply because
18 I had adhered to his instruction that there wasn't any
19 jurisdiction to entertain the issue while the mandate
20 was pending, and that right before the mandate came
21 out, Mr. Robertson died, and we agreed to hold
22 everything off until you-all sorted out what you-all
23 wanted to do in perspective of the loss of the lead
24 lawyer in the case. And then I did take a week's
25 vacation. I went to take my wife on a birthday trip

1 for a week and directed while I was gone to set up a
2 conference call so we could sort out where we were
3 going from here, having not heard from either one of
4 you.

5 Now, if I'm to deal with a motion, I'll have
6 to deal with the whole body of law that deals with the
7 motion, but I also have to deal with the mandate of
8 the Federal Circuit. And that may involve a different
9 approach to matters about who has what burdens, when,
10 and where. But in either event, I've got a task to do
11 and I'm just trying to sort out how it is that we're
12 going to do it.

13 And he has, in fact, teed up an issue, and
14 that is that the record does not support the issuance
15 of an injunction based solely on the infringement
16 claims that were sustained and left in effect.

17 And however else you want to deal with your
18 response to his motion, I do need you to address that
19 point.

20 MR. STRAPP: Understood, Your Honor.

21 THE COURT: And I realize how he's addressed
22 it and the fashion he's addressed it in his motion.
23 He'll have to live or die by the way he did it in
24 perspective of what you say and what he files in his
25 reply.

1 So, basically, what I'm hearing is you-all
2 are happy to have this go forward on the papers, that
3 I do not need to schedule an evidentiary hearing, that
4 I can get your briefs and go from there to satisfy the
5 mandate and/or to decide the motion of Lawson.

6 Is that what I'm understanding, Mr. Strapp?

7 MR. STRAPP: Yes, that's our opposition.

8 THE COURT: And, Mr. Thomasch, that's yours,
9 too?

10 MR. THOMASCH: Yes, Your Honor. Might I add
11 that we certainly did not think Your Honor was asleep
12 in any way.

13 THE COURT: Oh, Mr. Thomasch, come on. You
14 don't need to respond to everything.

15 MR. THOMASCH: I understand, Your Honor.
16 What I want to do is just underscore one thing about
17 the timing issue and the like. We believe because the
18 issue here is not whether this is just changed
19 circumstances have made it wrong for this to proceed,
20 for the injunction to proceed as is going forward.

21 The fundamental position we have is because
22 the patent claims in large respect were invalid, the
23 system claims were invalid, because of that if the
24 proper set of facts had been understood, the Court
25 would not have entered any injunction at all in 2011.

1 And then because of that, the entire
2 situation needs to be reevaluated under the
3 four-factor test in light of the one claim that was
4 valid and infringed, which is a method claim.

5 And we feel it's critical that the issue be
6 resolved before the contempt proceeding for two
7 reasons:

8 (1) If the Court agrees with us that the
9 injunction -- had the Court been aware that the system
10 claims were invalid and that only the method claim 26
11 was infringed, if the Court had had that set of facts
12 before it on the record before it, we believe that no
13 injunction would have issued, in which case there can
14 be no contempt proceeding, the same way there can't be
15 a contempt proceeding with regard to Configuration 2
16 in light of the invalidity of the claim that
17 underscores that configuration.

18 Secondly --

19 THE COURT: I understand that. Let me
20 resolve that.

21 We are going to have the contempt hearing. I
22 will have the briefs on the other issues. I'll have
23 the briefs on those issues. The order in which I
24 decide things will be something that you all can sort
25 out and deal with, but I want to hear the evidence and

1 get it done. There's been enough delay in this case
2 anyway.

3 This is not the only situation on the docket,
4 and it needs to be resolved, and I need to have it
5 sorted out, and so do both of you so that you can get
6 on with your lives, your clients.

7 MR. THOMASCH: It's Mr. Thomasch. If I might
8 add one small point. And that is, independent of
9 whether an injunction should exist is the question of
10 the scope. And the parties are in complete
11 disagreement as to whether, under any set of
12 circumstances, if Mr. Strapp is right about
13 everything, we still believe as a matter of law that
14 the products, because they have substantial
15 non-infringing uses, are not subject to an injunction
16 against their sale. All the damages for the
17 injunction proceeding would be, I'm sorry, for the
18 contempt proceeding, would be affected by the scope of
19 any injunction as well as whether there is an
20 injunction.

21 THE COURT: They might or might not. Let's
22 get the record straight, Mr. Thomasch. Let's just get
23 the record straight. Then we'll go from there.

24 MR. THOMASCH: Yes, Your Honor.

25 THE COURT: You all are ready to try the

1 case. Let's get that tried. These are matters that
2 are actually raised in your papers.

3 MR. THOMASCH: Yes, Your Honor. And we would
4 ask for oral argument on the injunction if we could.

5 THE COURT: I'll schedule that. I'll
6 probably schedule all the oral arguments at the same
7 time. I don't know. I have to wait and see what
8 everybody says before I sort that out.

9 My only objective today was truly to find out
10 whether we needed to have an evidentiary hearing and
11 to get it scheduled as promptly as possible.

12 I did not know the extent to which you would
13 use the same, if you required it, the same hearing on
14 the injunction, whether you would use the same people
15 you had in mind using in the contempt hearing. And if
16 possible, I was hopeful of saving everybody time and
17 effort in the process of hearing everybody on the
18 topics at the same time that they were all here. That
19 is the witnesses. But I don't need to worry about
20 that now because neither one of you think that an
21 evidentiary hearing is necessary on the injunction.

22 All right. Anything else? Is there anything
23 else that needs to be decided that's left to be
24 decided, left open here on this record preparatory to
25 deciding the contempt? Are there any motions that are

1 pending?

2 I thought I had asked you-all to prepare a
3 list of those things and I didn't get anything. So I
4 need to double check what it is that's left open, if
5 anything. Is there anything pending from your
6 standpoint, Mr. Strapp?

7 MR. STRAPP: Well, Your Honor, the only
8 motions that I recall that haven't yet been resolved
9 were motions that were taken up in February of 2012.
10 You may recall that both parties filed a series of
11 motions in limine to exclude certain testimony from
12 the experts that were going to be testifying at the
13 contempt hearing that was scheduled to take place last
14 year.

15 And the one ruling that Your Honor did make
16 was to exclude portions of Dr. Putnam's testimony.
17 That's Lawson's remedies expert. And you excluded him
18 from offering any testimony on his reasonable royalty
19 opinion. But other than that, you addressed the
20 issues at the hearing. I don't think you ever issued
21 a formal ruling, but I'm not sure that one is required
22 because I think you gave the parties guidelines about
23 what would and wouldn't be permitted from the experts
24 at the hearing.

25 THE COURT: So you're saying there are

1 pending some motions in limine. Can you give me a
2 list of those so I can make sure I know what to double
3 check on?

4 MR. STRAPP: Yes, Your Honor.

5 THE COURT: You think those can be, whatever
6 they are, you're saying you think they can be denied
7 as moot?

8 MR. STRAPP: Well, no. I think Your Honor
9 has -- didn't issue a formal order on those motions
10 except with respect to the motion as to Dr. Putman,
11 but that Your Honor gave the parties guidance that's
12 on the transcript of that hearing record that will
13 inform how the hearing goes forward with respect to
14 expert testimony in April.

15 THE COURT: All right. Give me the date of
16 that hearing also so I'll be on the same page you-all
17 are.

18 MR. STRAPP: Yes, Your Honor.

19 THE COURT: It's probably got a docket
20 number.

21 All right. Mr. Thomasch, are you in
22 agreement with him on that?

23 MR. THOMASCH: I am in agreement with Mr.
24 Strapp with respect to the liability experts. I think
25 you were very, very clear, and I believe that there

1 will be dramatically reduced testimony from the
2 liability experts on both sides.

3 There was a ruling with respect to
4 Dr. Putnam, our damages expert. There was a motion
5 filed with regard to Dr. Ugone, ePlus's expert. I do
6 believe that motion does need to be decided.

7 The others, I believe, your instructions to
8 both parties are totally sufficient and the testimony
9 has been truncated by the subsequent events anyway.

10 THE COURT: All right.

11 MR. STRAPP: Your Honor, the docket number, I
12 have it here, it's Docket No. 943, and that's the
13 transcript of the contempt motions hearing that took
14 place on February 29, 2012.

15 THE COURT: All right.

16 MR. THOMASCH: So the only open motion from
17 Lawson's perspective, Your Honor, is the motion with
18 respect to the opinions of Mr. Ugone, but I don't
19 think either side needs the liability experts decided
20 because I think your instructions covered those in
21 detail.

22 THE COURT: All right. Mr. Strapp, are you
23 in agreement that the Ugone motion needs to be
24 decided?

25 MR. STRAPP: Well, I don't think that Your

1 Honor did decide that issue. Just to refresh you of
2 what that was about.

3 Dr. Ugone had an opinion about disgorgement
4 as a matter of damages. Whether it's disgorgement of
5 profits, gross profits, net profits, that was a
6 dispute between the parties. And Lawson's argument
7 was that Dr. Ugone should not be able to testify about
8 disgorgement. So that was the subject of that motion.
9 And I think Mr. Thomasch is correct that that was
10 never decided by Your Honor.

11 THE COURT: So it needs to be decided. He
12 just said it needs to be decided. You agree.

13 MR. DUSSEAUT: Your Honor, this is Chris
14 Dusseault for Lawson, if I could just clarify.

15 THE COURT: Sure.

16 MR. DUSSEAUT: The motion of Dr. Ugone had
17 two parts. It was a motion to exclude his testimony
18 in whole for failing to take proper account of whether
19 there was actual harm to ePlus. It also argued
20 alternatively that it should be excluded in part based
21 on the particular approach to cost savings that he
22 took. And neither one of those arguments has been
23 decided yet.

24 THE COURT: Do you agree, Mr. Strapp, they
25 need to be decided?

1 MR. STRAPP: Yes. And let me just mention,
2 though, with respect to the specifics of the motion.
3 Part of the motion was about the cost savings opinion.
4 Dr. Ugone -- and both parties have offered
5 supplemental damages reports in light of additional
6 financial information. In a supplemental report of
7 Dr. Ugone, he did not address the cost savings, and he
8 does not intend to address that at the hearing. So I
9 think the motion is moot as to that part of
10 Dr. Ugone's opinions.

11 MR. DUSSEAUT: This is Chris Dusseault, Your
12 Honor.

13 If they'll agree that Dr. Ugone will not
14 address the cost savings approach, that's certainly
15 satisfactory to us on that piece of the motion.

16 THE COURT: I think you just agreed to that,
17 didn't you, Mr. Strapp?

18 MR. STRAPP: Yes.

19 THE COURT: Good. So we don't deal with
20 that.

21 All right. Well, we'll get on that and get
22 to work on it. Is there anything else that needs to
23 be done? Okay. I'll await your papers on the
24 responses to all this.

25 Now, are you all okay on pages and everything

1 else, both of you? You can deal with it in the
2 standard page limits; is that right?

3 MR. STRAPP: I think that is true, Your
4 Honor, we should be able to fit it within the page
5 limits.

6 MR. THOMASCH: And we will do the same with
7 our reply, Your Honor.

8 THE COURT: All right. That's fine. Thank
9 you all very much.

10 MR. THOMASCH: Thank you, Your Honor.

11 THE COURT: All right. Bye.

12 (The proceedings were adjourned at 3:33 PM.)

13

14 I, Diane J. Daffron, certify that the
15 foregoing is a correct transcript from the record of
16 proceedings in the above-entitled matter.

17

/s/

18

DIANE J. DAFFRON, RPR, CCR

DATE

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